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Supreme Court, U.S.
FILED
JAN 11
CLERK

No. 95-921

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

JOSEPH B. SHUMATE, JR.,

Petitioner,

V.

H.W. HUFF, JR.
THOMAS J. McCARTHY, JR.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Gary C. Hancock
Counsel of Record
GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON
65 East Main Street
Post Office Box 878
Pulaski, Virginia 24301
Telephone (540) 980-1360
Facsimile (540) 980-5264

Samuel D. Campbell
Attorney at Law
233 East Main Street
Post Office Box 945
Pulaski, Virginia 24301
Telephone (540) 980-0802
Facsimile (540) 980-3916

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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QUESTION PRESENTED

Does the Supreme Court of the United States have appellate jurisdiction under 28 U.S.C. §1257 to review a decision by the Supreme Court of Virginia solely arising under and based on the laws of the Commonwealth of Virginia?

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v.

H. W. HUFF, JR., ET AL.,
Respondents

BRIEF IN OPPOSITION

Respondents, H. W. Huff, Jr. and Thomas J. McCarthy, Jr., by counsel, respectfully request that this Court deny the Petition for Writ of Certiorari of petitioner, Joseph B. Shumate, Jr. ("Shumate"), by which he seeks review of an order of the Supreme Court of Virginia denying his petition for rehearing of his petition for appeal to that court, by which he sought review of a final decree and permanent injunction entered against him by the Circuit Court of Pulaski County, Virginia.

STATUTE INVOLVED

28 U.S.C. §1257 provides in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the Unites States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

This case solely involves issues of the real property laws of the Commonwealth of Virginia as adjudged by a Virginia state trial court and affirmed by the Supreme Court of Virginia.

After Shumate unlawfully blocked the roadway located within a private right of way, respondents, H. W. Huff, Jr. and Thomas J. McCarthy, Jr., filed suit in the Circuit Court of Pulaski County, Virginia ("state trial court") seeking a permanent injunction against Shumate to require him to remove a gate by which he had blocked the roadway and to prevent him from blocking the roadway in the future. Shumate responded to respondents' bill of complaint and

actively defended in the case.[1] After various hearings before the state trial court, and on the basis of motions for summary judgment filed by both parties, the state trial court entered a Final Decree and Permanent Injunction.[2] Rather than file a notice of appeal of this decree, Shumate elected to file a motion for a bill of review with the state trial court. The state trial court ruled that there was no error of law in the case record and that a bill of review did not lie against the prior, final decree and entered a decree denying Shumate's motion. (See petitioner's appendix 4a). Shumate then petitioned the Supreme Court of Virginia to grant him an appeal as to the latter decree. The Virginia Supreme Court denied his petition. (See petitioner's appendix 2a). Shumate then petitioned the Virginia Supreme Court for a rehearing of its denial of his petition for appeal. For the first and only time in this case, Shumate contended to the Virginia Supreme Court that it was violating his right to equal protection of the law under the Fourteenth Amendment to the United States Constitution by not hearing his appeal *en banc* and by not overturning the state trial court's rulings. The Virginia Supreme Court denied Shumate's rehearing petition without comment. (See petitioner's appendix 1a). The effect of the denial by the Supreme Court of Virginia of Shumate's appeal was to affirm the decisions of the state trial court as correct under applicable Virginia state law.

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[1] Shumate is a frequent and persistent self-litigator.

[2] The decree reproduced in petitioner's appendix 9a is not entirely accurate. The judge of the state trial court interlined as numbered paragraph 4 of that decree, "The defendant is enjoined from closing or blocking the right of way"; in place of the language stated in numbered paragraph 4 of the decree as reproduced by Shumate.

REASONS TO DENY THE PETITION

The Supreme Court of the United States Has No Jurisdiction to Review a Decision of the Supreme Court of Virginia Which Arises Under and Is Based Solely on the Laws of the Commonwealth of Virginia.

This Court has long and consistently held that the exercise of jurisdiction over final judgments of the highest court of a state, as granted to this Court under 28 U.S.C. §1257, is limited to cases involving a "federal question." See, e.g., *Webb v. Webb*, 451 U.S. 493 (1981); *Waters-Pierce Oil Co. v Texas*, 212 U.S. 86, 112 (1909). And as reflected in Rule 10 of this Court, the federal question must be "important" or 'substantial' and genuine, not a contrived "question" having no foundation or merit. See, e.g., *Ennis Waterworks v. Ennis*, 233 U.S. 652 (1914). As a federal court, this Court has no appellate jurisdiction over an issue which does not involve matters of the constitutionality of federal or state actions under the Constitution of the United States, federal statutes, or rights, privileges, and immunities of federal origin.

This Court has also long and consistently held that for this Court to have jurisdiction over the final judgment of a state's highest court under 28 U.S.C. §1257, it must appear from the record that a "federal question" was actually and properly raised before the state court(s) and that the state's highest court actually decided a federal question. See, e.g., *Webb v. Webb*, *supra*; *Street v. New York*, 394 U.S. 576 (1969); *First National Bank of Estherville v. Estherville*, 215 U.S. 341 (1910). In cases where the decision of the state's highest court is based on state law, the decision of that state court is binding on all federal courts, including this Court.

See, e.g., *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902); *Keene v. Clark*, 35 U.S. 291 (1836). A state's highest court is the final arbitrator of the laws of its state.

There is no "federal question" present in this case, as is shown on the face of Shumate's petition. All authorities cited by Shumate in his petition are decisions of the Supreme Court of Virginia construing solely the laws of the Commonwealth of Virginia, and all of the "questions presented" by Shumate are purely issues of Virginia state law. As the orders re-printed in the appendix to Shumate's petition clearly show, the decisions of the state trial court, as set forth in both of its decrees, were based solely on issues of Virginia state law. Neither of the parties raised any issue before the state trial court even remotely involving a "federal question" because there simply was none. Likewise, the decisions of the Supreme Court of Virginia in denying petitioner's petition for appeal and in denying his petition for rehearing were based solely on Virginia state law, that court thereby affirming the decision of the state trial court as correct. As only partially reflected in the final decree of the state trial court, but fully shown by the entire record in this case, Shumate's claims were fully and properly heard and adjudicated by the state trial court and by the Supreme Court of Virginia. Both courts properly applied solely applicable and fully dispositive state law to this case.

Shumate first asserted his contrived claim of a denial of equal protection under the Fourteenth Amendment to the United States Constitution in his petition for rehearing to the Virginia Supreme Court, wherein he demanded that that court grant him an *en banc* rehearing on his appeal, after that court had denied his petition for appeal. The Virginia

Supreme Court properly refused to accede to Shumate's demand and denied his petition for rehearing. This Court has refused to review the judgment of a state's highest court when a so-called "federal question" was raised for the first time in a petition for rehearing, after that court had already denied the petition for appeal, and where that court does not pass on the claimed federal question. *St. Louis & S. F. R. Co. v. Shepherd*, 240 U.S. 240 (1916); accord, *Wabash R. Co. v. Flannigan*, 192 U.S. 29 (1904).

This Court's decision in *Webb v. Webb*, *supra*, is controlling in this case. In *Webb*, this Court held that for it to have jurisdiction to review the judgment of a state's highest court, a federal question must have been properly raised in the state court system and passed on by the state's highest court from which the appeal is made. The "principal of comity that stands behind the `properly-raised-federal-question' doctrine," as discussed as length in *Webb*, applies here. 451 U.S. at 500. In the present case, the Supreme Court of Virginia made no ruling on Shumate's claim that that court was denying him his federally guaranteed right to equal protection under the state's laws because (1) he did not make any such claim before the state trial court;[3] (2) he did not make any such claim to the Virginia Supreme Court in his petition for appeal; (3) he contrived this claim only after

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[3] Pursuant to Rule 5:25 of the Supreme Court of Virginia and a legion of that court's decisions, any issue or objection not raised before the trial court will not be considered on appeal. Further, §8.01-678 of the Code of Virginia (1950), as amended, provides: "When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed for any other defect, imperfection, or omission in the record, or for any error committed on the trial."

the Virginia Supreme Court had denied his petition for appeal; (4) he asserted this claim for the first time in his petition for rehearing to the Virginia Supreme Court; and (5) the Virginia Supreme Court properly did not give any consideration to his claim, it being untimely and improperly raised and wholly frivolous, without merit or foundation whatsoever.

Rule 14.1(g)(i) of this Court[4] requires a petitioner seeking review of a state court judgment to specify (1) the stage in the proceeding, both in the court of first instance and in the appellate courts, when the federal question sought to be reviewed was raised, and (2) the method or manner of raising it and the way in which it was passed on by those courts, with specific reference to the places in the record where the matter appears, to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. No such specifications appear in Shumate's petition simply because he never properly or timely raised any "federal question" while before the Virginia state courts. As stated by Justice White in *Webb*, "Litigants seeking to bring cases [before this Court] from the state courts should take care to comply with the jurisdictional statute and [with this Court's] rules." 451 U.S. at 501. Shumate has done neither.

There is no basis whatsoever under 28 U.S.C. §1257 or under the settled precedent of this Court for this Court to review the decision of the Supreme Court of Virginia in this case.

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[4] Present Rule 14.1(g)(i) is the successor to former Rule 21.1(h) referred to in the Court's opinion in *Webb*, 451 U.S. at 495.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

And because Shumate's petition is wholly frivolous, without any merit or foundation, respondents request this Court to award them costs, single or double, against Shumate, pursuant to Rule 42.2 of this Court.

Respectfully submitted,

Gary C. Hancock
Counsel of record
Gilmer, Sadler, Ingram, Sutherland & Hutton
65 East Main Street
P.O. Box 878
Pulaski, Virginia 24301
Telephone 540 980 1360
Facsimile 540 980 5264

Samuel D. Campbell
233 East Main Street
P.O. Box 945
Pulaski, Virginia 24301
Telephone 540 980 0802
Facsimile 540 980 3916

Counsel for Respondents